SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 28 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 726

ANTHONY MARDEROSIAN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Defendant-Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on the 2nd day of November, A.D. 1964.

The opinion of the Court of Appeals (Woodbury, Chief Judge, Hartigan and Aldrich, Circuit Judges) is thus far unreported and is reprinted in Defendant-Petitioner's Appendix A, supra, page 31. The full text of the pertinent

opinions in the district court are set forth in the Appendix from the Court below, nine copies of which are tendered pursuant to Rule 21 (4) of this Court.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

Statement of the Case

The judgment of the Court of Appeals, from which Defendant-Petitioner seeks review, affirmed a judgment of conviction with respect to the Defendant-Petitioner, for a violation of Title 26, U.S.C. Section 7203 and Title 26, U.S.C. 7262. The pertinent parts of 7203 and 7262 are set forth in Defendant-Petitioner's Appendix B.

Upon the trial, Defendant-Petitioner Anthony Marderosian was convicted on two of four Counts as charged, and sentenced on the 17th day of January 1964. (R. 196-197) Appeal was taken to the Court of Appeals for the First Circuit and that Court, on November 2, 1964, affirmed the convictions.

Questions Presented

1. Did the Court of Appeals err in determining that the search warrant was issued upon probable cause?

2. Did the Court of Appeals err in determining that Defendant-Petitioner was not entitled to obtain the identity of the United States of America's confidential informant?

3. Did the Court of Appeals err in determining that the Trial Justice did not err in his supplemental instructions to the jury, without request therefor?

4. Did the Court of Appeals err in determining that the Trial Justice did not err in insisting that the jury agree upon a verdict?

5. Did the Court of Appeals err in determining that the Trial Justice did not err in denying Defendant-Petitioner's Motion for Acquittal at the close of the government's case after the jury's verdicts, and in determining that the jury verdicts were consistent with the law and the evidence.

Reasons for Allowance of the Writ
Statement of Facts

Defendant-Petitioner, Anthony Marderosian, is a resident of the City of Cranston in the State and District of Rhode Island. Sometime in December 1961 [the record indicates, however, earliest rental receipt as February 1962], the defendant-petitioner, who was then separated from his wife, rented an apartment on the second floor of an apartment building at 271 Woonasquatucke Avenue in North Providence, Rhode Island. (R. 52-53) The apartment was rented under the name of Anthony Maccarone or Maccaroni, and at the time of the renting, the landlady was informed of the defendant-petitioner's marital separation and that he worked nights and slept days. (R. 53). A telephone was installed on December 8, 1961 and the telephone was listed

in the usual telephone directory. (R. 127). On the afternoon of May 8, 1962, defendant's apartment was raided by Federal agents on the basis of a search warrant issued that day by the United States Commissioner for the District of Rhode Island. The search warrant was based upon an affidavit signed by Robert Gray, Special Agent, Intelligence Division, Internal Revenue Service, United States Treasury. (R. 6-11). The affidavit was based upon information obtained from a confidential informant on March 27, 1962, which alleged that defendant-petitioner was then operating a bookmaking business from the apartment, as well as surveillance by Agent Gray during a five week period in which he stated he saw the defendant enter the apartment on four occasions and saw the defendant leave the premises on three occasions. The raid, in execution of the search warrant, netted various items such as a radio, wrist watch, white pads, ballpoint pens etcetera. (R. 13, 16). On the basis of the evidence seized in the raid, the defendant-petitioner was charged with being engaged in the business of accepting wagers on sports events, as defined in Title 26, U.S. Code Section 4421, and wilfully failing to pay, prior to engaging therein, the special tax imposed by Title 26, U.S. Code Section 4411, for the fiscal year ending June 30, 1962, in violation of Title 26, U.S. Code Section 7203. In the second count of the same Criminal Information #6826, the defendant was charged with having engaged in the same activities in violation of Title 26, U.S. Code Section 7262.

In a separate Criminal Information #6879, in Count III thereof, the defendant was also charged with having received wagers as an agent of one liable for the tax imposed by Title 26, U.S. Code Section 4401, and violating the provisions of Title 26, U.S. Code Section 7203. In Count IV of Criminal Information #6879, the defendant was charged as an agent for a principal liable for the tax

imposed by Title 26, U.S. Code Section 4401, for violation of Title 26, U.S. Code 7262.

Prior to trial, defendant-petitioners filed a motion to obtain identity of the confidential informant relied upon in complaining officer's affidavit in support of the search warrant. On Monday, August 20, 1962, the Court, on oral arguments without testimony, denied the motion. (R. 13, 14, 24-26).

Prior to trial, defendant filed a motion for the return of seized property and the suppression of evidence. The motion was heard on August 20, 1962, upon argument of counsel without evidence and was denied by the Court. (R. 14-15, 27-29).

The trial commenced on November 14, 1963 and the United States Government, by its Bill of Particulars, stated that the defendant engaged in the business of wagering on horses between March 27, 1962 to May 8, 1962.

The United States Government at the trial produced evidence to show that the defendant had rented an apartment some time in December 1961 in an apartment house located at 271 Woonasquatucket Avenue in North Providence, Rhode Island. (R. 51). The lessor testified that she rented the premises to the defendant under the name of Anthony Maccarone or Maccaroni. (R. 46-47). The evidence further disclosed that a telephone was installed in the premises on December 8, 1961, and was listed in the published telephone directory to Anthony Maccarone. (R. 127). The lessor testified that the defendant had rented the apartment from her and told her that he was separated from his wife and that he worked nights and slept during the day. (R. 53). The lessor further testified that there were seven apartments in the house and that the defendant's was located on the second floor. (R. 54). The lessor testified that she never saw anyone going in or out of the apartment. (R. 55) She further testified that she never heard telephones ringing in the apartment. (R. 55).

The lessor further testified that she only saw the defendant on a few occasions, and this was around 5 or 6 o'clock at night leaving the apartment. (R. 55).

In the entire transcript of the trial evidence, there was no evidence whatsoever introduced by the United States Government to show any activities whatsoever on the part of the defendant other than the testimony of the lessor who testified that she only saw the defendant leaving the apartment on a few occasions around 5 or 6 o'clock at night and that she never heard any phones ringing in the apartment. (R. 55). All of the government's testimony concerns the raiding of the apartment by virtue of a search warrant and the evidence found in the apartment during the raid on May 8, 1962. The defendant did not testify and did not produce any evidence.

The defendant was found guilty on Counts I and II in Criminal Information #6826. On Counts III and IV of Criminal Information #6879, the defendant was found not guilty of each count.

On the two counts in Criminal Information #6826, concerned in this appeal, the defendant was found guilty of having engaged in the business of accepting wagers on horse races without having first paid the special tax imposed by the federal statutes previously referred to. Count I alleges a wilfull violation of Title 26, U.S. Code Section 7203, and Count II, a non wilfull violation of Title 26, U.S. Code Section 7262.

As to the First Question Presented

Was the search warrant issued upon probable cause?

The question concerning the probable cause surrounding the issuance of the search warrant will be discussed in three segments:

A. Whether the decision of the United States Commissioner is reviewable?

B. Whether the property described in the search warrant and sought to be seized was the proper subject of a search warrant?

C. Whether the warrant was issued upon probable cause contained in the government agent's affidavit?

A. *Whether the decision of the United States Commissioner is reviewable?*

The search warrant was issued by the United States Commissioner for the District of Rhode Island upon affidavit of Robert Gray, an Internal Revenue agent. The warrant recites the satisfaction of the Commissioner with the existence of probable cause for the issuance thereof. This finding, however, although in the first instance being directed to the Commissioner, is not conclusive upon the Federal Court when questioned. It is firmly established that where, as here, the Commissioner's judgment is predicated solely upon an affidavit, a Federal Court is not relieved for making its own judgment as to whether the affidavit would, in fact and law, provide a substantial basis for the Commissioner to have concluded probable cause. *Schoeneman* v. *United States,* (D.C. Circ. 1963) 317 F2d. 173, 176. In this case, the United States District Court for the District of Rhode Island sustained the action and finding of the Commissioner without evidence and solely upon oral argument of counsel on petitioner's motion to suppress (R. 27-39). The determination made by the District Judge, it is contended, was error and is urged now as such before this Circuit Court of Appeals. The District Court's determination is reviewable. *(Schoeneman* v. *United States, supra.)*

B. *Was the Property Described in the Warrant the Proper Subject of a Search Warrant?*

It is fundamental that there is a distinction between evidentiary materials or property which cannot be seized under authority of a search warrant, and objects or property which may validly be seized. *Harris* v. *United States,* 331 U.S. 145, 154 (1947). Under the *Federal Rules of Criminal Procedure,* 41 (b) (2), the property seized must be:

> "designed or intended for use or which is or has been used as the means of committing a criminal offense."

Then property described in the instant warrant is as follows:

> "Bookmaking records, so called, and wagering paraphernalia consisting of bet slips, so called, rundown sheets, so called, and other paraphernalia, adding machine, pencils, radio and telephones, and money used in, or derived from a bookmaking and wagering operation, so called, which are being used in violation of Sections 4411, 4412 and 7203, Title 26 United States Code (Internal Revenue Code, 1954 . . ." (R. 12)

The warrant states that the described property was being used in violation of Sections 4411, 4412 and 7203 of the Internal Revenue Code of 1954. It should now be noted that Section 4411 imposes a tax on each person engaged in the business of accepting wagers; Section 4412 requires each person subject to payment of the tax to register with the proper Internal Revenue District, and Section 7203 makes it a misdemeanor to violate either Sections 4411 or 4412. Nowhere in the Internal Revenue Code or in the

affidavit in support of the search warrant is there any basis for the allegation that the *possession or* concealment of the articles seized in the raid and from the appellant *was or is a crime.* The possession, in and of itself, of pencils, a radio, an adding machine, a telephone or United States currency, does not, by any stretch of reasonable imagination, constitute a crime. These articles of property described in the search warrant, plus those seized, which included a wrist watch, three ball point pens, etcetera, constitute nothing more than evidentiary material and a search for this evidence as such clearly violates the Fourth Amendment to the United States Constitution. *Gouled* v. *United States*, 255 U.S. 298 (1921); *Application of Houlihan*, 31 F.R.D. 145, 149 (1962).

Defendant-petitioner's basic contention is that nowhere in the Internal Revenue Code or in the Government agent's affidavit in support of the search warrant is there any basis or allegation made that the property described in the search warrant and later seized is or was the means or the instrumentality by which the crime charged to the defendant was committed. The sections of the Internal Revenue Code of 1954, which the defendant-petitioner was accused of violating, *do not make it a crime to engage in wagering operations.* They simply impose a tax upon those so engaged and require the individual to register for the tax. The crime is not the wagering operation; the crime is the failure to register and to pay the tax. The property described in the instant search warrant had, therefore, nothing to do with being the means or the instrumentality by which the crime of failing to register and pay tax was committed. It follows, therefore, that property which is not being used as the means of committing the crime is not properly the subject of a search warrant. *Gouled* v. *United States*, supra. In this case, what did the radio, the ball pens, the man's wrist watch, etcetera, have to do with the

crime charged which was failing to register and purchase the wagering stamp? Was the man's wrist watch the means by which the petitioner failed to register and purchase the wagering stamp? Was the radio the means by which the appellant failed to register and purchase the wagering stamp? Was the white pad? Was the telephone? It is perfectly obvious these items of evidence were seized not because they were being used to avoid obtaining the tax stamp, but instead, for evidence to show that the petitioner was engaging in a wagering operation. The crime is not the wagering operation; the crime is the failure to register and pay the tax. The articles were, therefore, merely evidentiary material and were not, therefore, the proper subject of a search warrant. *Gouled* v. *United States*, supra, at page 309, 310; *Harris* v. *United States*, 331 U.S. 145, 154 (1957).

An almost identical factual situation was considered in the case of *Application of Houlihan*, 31 F.R.D. 145 (1962). The Court in that case granted the motion to suppress on the identical grounds which are urged herein. The same result should follow in this case and the action of the Trial Justice in admitting into evidence the seized property over the objection of the petitioner (R. 57) and in denying petitioner's motion to suppress, was, therefore, error.

C. *Whether the Search Warrant was Issued Upon Probable Cause?*

On May 8, 1962, Robert Gray, Special Agent for the Internal Revenue Service, signed an affidavit stating that he had reason to believe that on the premises at 271 Woonasquatucket Avenue, North Providence, Rhode Island, in an apartment located to the rear of the second floor, there were concealed certain bookmaking records and wagering paraphernalia which were used in a wagering operation in viola-

tion of Sections 4411 and 4412, and 7203 of Title 26, United States Code, 1954. These sections do not prohibit a wagering operation, but merely impose a tax on one. The facts recited in the affidavit stated that on or about March 27, 1962, information had been received from a confidential source that the defendant was then presently engaged in the business of accepting wagers in the apartment previously described herein. The affidavit further recited that the defendant was associated in the operation with one Vincent Carlone and that both were regularly driven to the premises in an automobile owned by one George Barrett, the automobile being a 1953 Nash sedan.

Agent Gray further stated in the affidavit that acting on the confidential information, he conducted a surveillance of Marderosian, Carlone and Barrett on various times between March 28, 1962, and May 3, 1962, a period of some five weeks. The surveillance disclosed that the defendant was observed entering the premises on four occasions: April 2, 3, and 9, 1962, and May 3, 1962, and leaving the premises on three occasions: March 29, 30, 1962, and April 2, 1962. The affidavit further recited that the defendant's associate Carlone was observed entering the premises on two occasions during the five week surveillance. Barrett, the associate alleged to have regularly driven the defendant to the premises, was observed driving in the direction of said premises on "several occasions." No dates of these occurrences were stated. The affidavit further stated that defendant Marderosian had been convicted in the Superior Court for the State of Rhode Island on a complaint charging him with aiding and assisting and recording of a bet on a horse race, which conviction was upheld by the Supreme Court of the State of Rhode Island on February 28, 1958. The affidavit further stated that the defendant was convicted on a violation of State gaming laws in the District Court of the Fourth Judicial District on November 22,

1961. This last fact was later conceded by the Government to be false. The affidavit further stated that at Agent Gray's request, another Special Agent of the Intelligence Division had made inquiry of the New England Telephone & Telegraph Company with respect to telephone service at the premises, and the agent had informed him that the service commenced on or about December 4, 1961. (The evidence at the trial disclosed the telephone was installed on December 8, 1961. (R. 132)

Agent Gray's affidavit further stated that he had made numerous attempts to call the telephone number listed to the premises during morning and evening hours and received no response to such calls. Agent Gray's affidavit stated, however, that calls made by him between 11:30 a.m. and 3:00 p.m. on week days were answered by a person with a male voice who used the identification of Vinny. Agent Gray's affidavit contains no allegations whatsoever that he at any time placed any bets or attempted to place any bets with the male person who answered the telephone. Based on the above facts, Agent Gray concluded that the supposed occupant of the apartment, under the name of Anthony Maccarone, was a non-existent person. No facts in support of this conclusion were set forth in the affidavit.

It is interesting to note that the affidavit upon which Agent Gray concluded that a bookmaking operation in the apartment at 271 Woonasquatucket Avenue, North Providence, Rhode Island, was in existence, merely shows that he observed the petitioner entering the premises on four separate occasions during a five week surveillance. In addition, the petitioner was seen leaving the premises on three occasions, one of which occasions was on the same day that the defendant was seen entering. There are no facts alleged in the affidavit which show or allege any bets to have been placed over the telephone which was answered by a male voice in the apartment. There is additionally no

allegation of persons entering and leaving the premises. In substance, upon these facts, a search warrant was issued by the United States Commissioner for the District of Rhode Island.

It is significant to note that in addition to the complete absence of any legal facts set out in the affidavit to show the existence of any gambling activities in or about the premises searched on the date of the warrant, there is another factor to be considered in evaluating the legal substance of the affidavit. This factor is time. The affidavit is dated May 8, 1962.

Agent Gray's affidavit states that on March 27, 1962, his confidential informant informed him that the petitioner was engaged in a bookmaking operation in association with another person called Carlone. This was forty-three days prior to the date of the affidavit. Agent Gray's affidavit also states that on April 2, 3 and 9, and on May 3, 1962, he saw defendant-petitioner enter the premises. On March 29, 30, and April 2, 1962, he saw defendant-petitioner leave the premises. The observations simmer down to a total of seven occurrences wherein the defendant-petitioner was simply seen entering or leaving the subject premises during the forty-three day period. Only one of the observations occurred within thirty days of the affidavit and request for the search warrant. The affidavit contained no allegation of fact by Agent Gray that the activities he questioned were then, on May 8, 1962, presently in operation in the premises. As a matter of fact, Agent Gray did not even state in his affidavit that the defendant or his associate on the day of the affidavit were then occupying the apartment. The affidavit states that the apartment "has been occupied by the said Marderosian and Carlone" (R. 10). The absence of a date, plus the choice of language used by Agent Gray is clearly indicative of a past occurrence and not a present occupation. The only allegation of bookmaking was from

the confidential informant which was forty-three days prior to the date of the affidavit. In *United States* v. *Sawyer*, (Ed. Pa. 1963) 213 F. Supp. 38 at 40, the Court, in considering a motion to suppress evidence, said:

> "We have found no case which has maintained a search warrant where the supporting affidavits were based on observations made more than thirty days previously."

The proof in an affidavit necessary to support a search warrant must be so closely related to the time of the issuance of the warrant so as to justify a finding of probable cause on the date of the warrant. *Sgro* v. *United States*, 287 U.S. 206, 210, 211 (1932); *United States* v. *Nichols*, (W.D. Ark. 1950) 89 F. Supp. 953.

In the instant affidavit, the only fact alleged within thirty days of the date of the affidavit in support of the search warrant is that on May 3, 1962, five days prior to the warrant, the petitioner was simply seen entering the raided premises. This was twenty-four days after he was last seen entering. Reducing the affidavit to judicial scrutiny, it appears that the only fact alleged to have occurred within thirty days of the search warrant at the raided premises is that in which the affiant states he saw the petitioner enter the premises. If the simple act of entering a building can be the basis of a search warrant, it is time to review and revise the entire constitutional concepts which provide for the protection of individual liberty against Government intrusion. The instant search warrant must be viewed and judged as of the time it was issued and in the light of the allegations and facts alleged in the affidavit and not with the benefit of hind-sight. *Schoeneman* v. *United States*, (D.C. Cir. 1963) 317 F2d. 173, 177.

It is further interesting to note that at the trial of the case, there was absolutely no evidence whatsoever from any

source whatever indicating that any gambling activities had been going on within the apartment prior to and including the day of the raid, which could have been included in the affidavit. The only evidence introduced showing the conduct of the defendant prior to the raid was that of the lessor of the premises who testified that she had leased the premises to the defendant, had seen him leave the premises on several occasions between five and six o'clock during the period from December 1961 through May 1962 (R. 55), and that during that period of time, she had not heard any telephones ringing in his apartment (R. 55), and had seen no one going in and out of his apartment (R. 55). On this set of facts, it is respectfully submitted that there was no evidence whatsoever justifying the finding of probable cause and the issuance of a search warrant for the premises where in the defendant was arrested. *Jones* v. *United States*, 362 U.S. 257 (1960).

As to the Second Question Presented

Was the Defendant-Petitioner entitled to obtain the identity of the United States of America's confidential informant?

Prior to the trial, defendant-petitioner Marderosian, through his counsel, filed a Motion to Obtain the Identity of the Confidential Informant, who is referred to in Agent Gray's affidavit of May 8, 1962, given in support of the search warrant. This was the only affidavit presented. The confidential informant was relied upon as having stated that the defendant was then, on March 27, 1962, presently engaged in the business of bookmaking in the apartment which was subsequently raided. The statements contained in the affidavit were in and of themselves insufficient to justify the issuance of the search warrant. The buttressing

feature of the warrant was the confidential informant's bold statement that a bookmaking operation was, some forty-three days prior to the date of the affidavit, being conducted. For this reason, it was necessary for the defendant to know the identity of the confidential informant so that at the hearing on the Motion to Suppress the Evidence, and later at the trial, the defendant would be able to subpoena the confidential informant as a witness to ascertain the extent of his knowledge as well as his veracity. The record of the trial discloses no evidence whatsoever of any gambling activities having been conducted in or about the premises prior to the raid. In the light of the weak affidavit, the testimony of the triggering force in the case was most certainly relevant and would have been helpful to the defendant-petitioner's defense. This is the extent of the measure required to satisfy the need for disclosure. *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957); *Portomene* v. *United States*. (5th Circuit 1955) 221 F2d. 582; *United States* v. *Cenforti*, (7th Circuit 1952) 200 F2d. 365; *Sorrentino* v. *United States*, (9th Circuit 1947) 163 F2d. 627.

To permit the Government to present a case which is positively devoid of any evidence showing any activities relating to the use of the raided premises for gambling purposes prior to the raid, and to obtain a conviction solely upon evidence obtained during the raid, is violative of the defendant's Constitutional rights and places the defendant at the mercy of a confidential informant who was never produced at the hearing on the Motion to Suppress or at the trial, and whose name and identity was denied to the defendant.

The record further discloses that the agent who gave the affidavit, Robert Gray, did not testify at the trial as to any of the facts set forth in his affidavit concerning the bookmaking operation which he alleged the defendant in the

affidavit to have been conducting. This is contrary to the views on probable cause expressed as recently as June 15, 1964 by the United States Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 12 L ed 2d 723, 84 S Ct. (1964).

It is respectfully submitted that the United States District Judge for the District of Rhode Island erred in denying the defendant's Motion to Obtain the Identity of the Confidential Informant whose evidence was most essential to the defendant in order for him to establish not only his innocence, but to prove that the search warrant affidavit was insufficient in law to support the warrant.

As to the Third Question Presented

Did the Trial Justice err in his supplemental instructions to the jury, without request therefor?

The jury retired to deliberate the defendant's case at 12:40 p.m. on November 19, 1963. (R. 185) At 5:50 p.m. the Court received a message from one of the jurors that the juror wished to make a telephone call. (R. 186) The Court thereupon, upon its own initiative, had the jury brought into the Court and indicated that it appeared that because of the fact that they had been considering the case for some considerable length of time, the Court felt it would be helpful in suggesting to the jury "a few thoughts" for them to consider in their deliberations. (R. 185) The Court thereupon undertook to deliver in general what is commonly known as the "Allen" or "dynamite" charge. (R. 185-186) *Allen* v. *United States*, 164 U.S. 492, 501 (1896); *Green* v. *United States*, 309 F.2d. 852 (C.A. 5, 1962).

In *Allen* v. *United States*, supra, the "Allen" charge was taken from the charge which had been given to a jury in *Commonwealth* v. *Tuey*, 8 Cuch (Mass.) 1, (1851). In *Allen*, supra, the charge itself is not set forth, and, as a

matter of fact, the Supreme Court merely paraphrased the charge because, as it said in its decision at page 494, it was embarrased by the voluminousness of the charge. What the Court did do however, is set out what could perhaps be broken down into seven rules of thumb to be followed by future trial justices. The "Allen" charge which was used in the instant case went beyond the limits of the original "Allen" charge. It is implicit in the decisions of the United States Supreme Court dealing with the *Allen* case, supra, namely, *Burton* v. *United States*, 196 U.S. 283, (1905); *Brasfield* v. *United States*, 272 U.S. 448 (1926), that the "Allen" charge itself sets forth the outermost permissible limits beyond which a trial justice should not venture. See, e.g. *United States* v. *Rogers*, 289 F2d. 433, 435 (C.A. 4, 1961).

In the instant case, the trial justice instructed the jury that the trial of the case was expensive to the Government and to the defendant and that the cases had to be decided. (R. 185) In addition, and it should be emphasized, the Court, while following through in general on the "Allen" charge, did not say that the jurors had a right to insist and to persist in their own decision. Instead, the Court stated that they should consider everyone's views and that any member of the jury should not close his or her ears to the arguments of other jurors who were equally intelligent and honest. (R. 185-186)

In *Allen* v. *United States*, supra, the question of the expense to the Government and to the defense was not mentioned. In *Allen*, supra, it is implicit within the rules set down that each juror should examine the question with candor and proper regard to the opinions of each other with the added precaution that the verdict must be the verdict of each individual juror. This instruction is absent in the instant supplemental charge which was given at 5:50 p.m. It is to be further noted that nowhere in this

supplemental charge is there any instruction on the part of the trial justice that any one of the jurors had a right to insist upon his or her individual view and opinion even to the point of a hung jury. In *Rhodes* v. *United States*, 282 F2d. 59 (C.A. 4, 1960), the Court approved the so-called "Allen" or "dynamite" charge, but only on condition that the additional charge made equally clear that the jury's verdict must represent the final judgment of each juror and not merely his acquiescence in a majority view of which he remains conscientiously unconvinced. In *Huffman* v. *United States*, 297 F2d. 754, 759 (C.A. 5, 1962), Judge Brown in his dissent emphasized the right of a defendant to a hung jury or a mistrial and stated that any attempt by the trial justice to force the jurors into a unanimous verdict denied to the defendant the possibility of a hung jury or a mistrial. In *United States* v. *Rogers*, 289 F2d. 433, 436, (C.A. 4, 1961), the Court there said that the "Allen" charge, when given, must direct attention to the duties of a juror to dissent from the majority if the dissent is founded upon reasoned conclusions reasonably arrived at and reasonably held. The instant charge does not do so. In *Powell* v. *United States*, 297 F2d. 318, 320 (C.A. 5, 1962), the Court again pointed out that the trial justice, in giving the "Allen" charge, should emphasize to the jury that they have a right to disagree.

In *United States* v. *Smith*, 303 F2d. 341 (1962), the Trial justice, without an indication from the jury of their inability to agree, recalled the jury and delivered, sua sponte, the "Allen" charge and included the admonition of expense of another trial, etcetera. The Court felt that the charge went beyond the original limits of "Allen" and reversed on the theory that the additions to the "Allen" Charge did not simply guide the jury, but inclined their deliberations.

In *Powell* v. *United States*, 297 F2d. 318 (C.A. 5, 1962), the trial justice, in a "dynamite" charge to the jury

similar to the instant case, emphasized the duty of the jury to agree and the fact that they should not be stubborn in their beliefs, etcetera. The Court reversed and said that the trial justice went too far in informing them that they ought to be able to agree on a verdict.

It is respectfully submitted that the action of a trial justice in calling in a jury on the Court's motion and injecting the "Allen" charge into the case is not in and of itself reversible error. *United States* v. *Kahaner*, 317 F2d. 484 (C.A. 2, 1963). However, the language of the trial justice in the instant case which was intertwined with the so-called "Allen" charge, transformed the trial justice's action into error. A reading of the instant "Allen" charge clearly indicates that the trial justice was telling the jury that they *had* to decide the cases and, "there is no reason to believe that it ever will be possible to submit them to twelve jurors more impartial, more capable of deciding them than you are." (R. 185-186) The Court further instructed the jury that they should not have gone into the jury room with a fixed determination and that they should not close their ears to the arguments of the other jurors who were equally intelligent and honest. (R. 186) What the trial justice did is tell the jury that they had to decide the case and yet, he neglected to inform them that they had a right to maintain their own individual views even to the point of a hung jury or a mistrial. The trial justice's language, wherein he stated that the case had to be decided and that there was no reason to believe that it will ever be possible to submit them to twelve jurors more impartial and more capable of deciding them than the present jury, amounted to an actual admonition to the jury that it was *that* particular jury that would have to decide the case. The trial justice did not say that in the event they did not agree, another jury would be selected to hear the case, and the net result was that this jury was led to believe

that it was *the* jury that had to decide. This, without question, took away whatever rights the defendant had to an individual vote on the jury which could have resulted in a hung jury. The "Allen" charge which was given to the jury in the instant case does not conform to the charge as approved in *Allen* v. *United States*, supra; *Burton* v. *United States*, supra, and *Brasfield* v. *United States*, supra.

As to the Fourth Question Presented

Did the Trial Justice err in insisting that the jury agree upon a verdict?

The Jury retired to deliberate the defendant's case at 12:10 p.m. on November 19, 1963. (R. 185) At 5:50 p.m., the Court received a message from one of the jurors that the juror wished to make a telephone call. (R. 186) The trial justice decided on his own that it would be an opportune time to suggest a few thoughts to the jury which they could consider in their deliberations. (R. 185) The trial justice thereupon delivered the so-called "Allen" or "dynamite" charge to the jury, in which charge the defendant-petitioner contends there was error. (R. 185-186) The jury resumed its deliberations at 6:00 p.m. and at 11:40 p.m. sent a communication to the trial justice stating that they were unable to reach a verdict. (R. 187) The trial justice thereupon called in the jury and inquired of the jury as to whether or not there was any doubt in their minds about his instructions which he had previously given. The following took place:

"The Foreman: We have nothing particular, your Honor."

"The Court: Your difficulty then, I take it, is not

with any of my instructions or any misunderstanding as to what I may have said to you."

"The Foreman: That is true."

"The Court: I dislike, Mr. Foreman, ladies and gentlemen, to keep you at this task any longer, but, as I said to you earlier in the evening, this case must be decided and I have no reason to believe that it will ever be possible to select twelve jurors more capable of deciding it than you are." (R. 187)

The Court thereupon instructed the jury that it was disposed to give them ample time to consider and re-examine the evidence and to read back any part of the testimony that they wished to have read back. (R. 187) The Court also advised the jury that he would be very glad to read back any part of his charge, or any part of the evidence that they desired. (R. 188) The Foreman thereupon indicated to the Court "that there has come up a little doubt" on the terms "accept" and "receive". (R. 188) The Court then attempted to explain the difference between the terms "accept" and "receive", and also explained to them the difference between a "principal" and an "agent". (R. 188) There followed a further question from the Foreman of the jury indicating that there were a "little feeling" that certain parts of the charge should be re-read concerning "concrete evidence, substantial evidence and so on." (R. 189) The Court then asked if they had any question in their minds as to his instructions on reasonable doubt and the Foreman replied that the problem was also troublesome. (R. 189). The net result of what occurred after the jury informed the trial justice that they were unable to reach a verdict at 11:40 p.m. amounted to an intrusion on the part of the trial justice into the deliberations of the jury. This, most certainly, is error. When the jury informed the Court that it was unable to reach a verdict, the

trial justice should have accepted their notification as indication of their inability to agree. A mistrial should have been declared. The defendant in a criminal case is entitled to a hung jury and a mistrial, when the jury is unable to agree. In the instant case, the trial justice was informed that the jury was unable to reach a verdict. (R. 187) The trial justice called in the jury and asked the Foreman if there were any question in their minds concerning any of the instructions he had given them, and including any instructions on the so-called "Allen" or "dynamite" charge that he had subsequently given to them. (R. 187) The Foreman replied that they had no question as to the charge. (R. 187) Since the jurors are the sole triers of the fact, and since the Foreman informed the Court there was no trouble and no question concerning the charge, the trial justice should have accepted the jury's communication as notification of a hung jury. There was no reason for the Court to then pry into the reason for the inability of the jury to agree. They had no question on the law of the charge; the disagreement was over the facts. The questions of the Court which thereafter followed are similar to situations wherein a trial justice seeks to determine the standing of the jury during its deliberations. While the trial justice in the instant case did not attempt to determine the numerical standing of the jury, he nonetheless did inquire and intrude to the extent that he brought out that a minority on the jury existed. The action of the trial justice in the instant case, while not intending to determine the standing of the jury on the question of innocense or guilt, did, in fact, amount to an inquiry as to the reason for the disagreement and did, in reality, bring out the fact that a minority opinion existed that could not be resolved. The question and answer period which followed thereafter between the Court and the Foreman on questions of fact was error. If the trial justice is barred

from inquiring as to the standing of a jury, he most certainly should be barred from inquiring on his own as to why the jury sent in a communication indicating it could not agree. Compare, *Nigro* v. *United States*, 4 F2d. 781 (1925); *Jacobs* v. *United States*, 279 F2d 826 (C.A. 8, 1960); *Jordan* v. *United States*, 22 F2d. 966 (C.A. 9, 1927); *Anderton* v. *United States*, 262 F2d. 761 (C.A. 8, 1959).

The net effect of the trial justice's actions in this case upon the deliberations of the jurors is not only evident, but equally obvious. The jury, which had been unable to agree from 12:10 p.m. until 11:40 p.m., some eleven and one half hours, retired at 11:55 p.m. and returned one hour and twenty-five minutes later with guilty verdicts. (R. 191-193) In *Peterson* v. *United States*, 213 Fed. 920, 926 (C.A. 9, 1914), a jury which had been out for some time was told to reconsider and continue deliberations after receiving a charge similar to the instant charge. One hour later, the jury returned with guilty verdicts. The Court said, in reversing, that the impression in the jurors minds made by the charge was borne out by the event that after not having been able to agree all day, the jury, after the charge and action of the Court, was then able to agree on a verdict one hour later. In the instant case, when the jury reported to the Court that it could not agree on a verdict after deliberating some eleven and one half hours, it was unusually coincidental that after the discussions between the court and the jury, they were able to reach a verdict one hour and twenty minutes later. The action of the Court in eliciting from the Foreman through question and answer the reasons for the jury's disagreement was an overreaching action on the part of the trial justice. It is obvious, from reading the transcript of what occurred when the jury returned at 11:40 p.m. that the trial justice took part in the deliberations of the jury (R. 187-191).

The action of the trial justice in injecting himself into the reasons for the inability of the jury to reach a verdict was, as previously stated, error. In addition, the error was aggravated by the fact that the trial justice, in addition to the previous "Allen" or "dynamite" charge that he had given, again at 11:40 p.m. instructed the jury, as he had earlier in the evening, that the case must be decided and that he saw no reason to believe that it would ever be possible to select twelve jurors more capable of deciding it than the present jury. (R. 187) This was clearly beyond the permissible limits of the "Allen" charge and amounted to an absolute direction and order to arrive at a verdict. (R. 187) Nowhere did the Court instruct the jury that the jurors had a right to insist upon their individual opinions. This was error. *Powell* v. *United States*, 297 F2d. 318, 320 (C.A. 5, 1962); *Rhodes* v. *United States*, 282 F2d. 59, 62; *United States* v. *Smith*, 303 F2d 341 (1962); *United States* v. *Rogers*, 289 F2d. 433, 436 (C.A. 4, 1961); *Green* v. *United States*, 309 F2d. 852 (C.A. 5, 1962).

As to the Fifth Question Presented

Did the Trial Justice err in denying Defendant-Petitioner's Motion for Acquittal at the close of the government's case after the jury's verdicts; and in determining that the jury verdicts were consistent with the law and the evidence?

The Government charged the defendant-petitioner with four offenses contained in two separate Counts in two separate Criminal Informations. In Criminal Information No. 6826, defendant was charged as being engaged in the business of accepting wagers as a *principal*, without registering and paying the gambling tax required. On these two counts he was found guilty. In Criminal Information No.

6879, the defendant was charged as an agent, and having engaged in the business of receiving wagers for and on behalf of a principal subject and liable to the tax and not having registered. On these two counts charging him as an agent, defendant was found not guilty. The evidence presented by the Government at the trial does not support or permit the guilty verdicts.

The evidence is that defendant rented an apartment on or about December 1961 at 271 Woonasquatucket Avenue in North Providence, Rhode Island. (R. 51) A telephone had been installed in the apartment the previous December 8, 1961. (R. 132) The landlady or lessor never saw anyone enter or leave the apartment and never heard any telephones ringing in the apartment. (R. 55) On March 27, 1962, a confidential informant gave information to a Government agent that defendant was *accepting wagers* in the rented apartment. (R. 7) The confidential informant is not reported to have said in the Government agent's affidavit whether the defendant was accepting wagers as a principal or as an agent for another person. (He was however charged as both) The Government agent observed, as stated in his affidavit in support of his request for a search warrant, that he had observed the defendant, during a six week period enter the apartment on four separate occasions and leave the apartment on three separate occasions. (R. 8) The search netted a radio, two Armstrong Daily News Reviews dated May 7 and 8, 1962, five packages of white pads, 1 calendar, forty tally sheets with numbers and writings on same, 1 wrist watch, 1 wastepaper basket, three Papermate refills, three ballpoint pens and miscellaneous slips of paper with numbers and writings thereon. (R. 16) The defendant was in the apartment when it was raided. The Government agent who participated in the raid testified that the defendant was not observed writing on any of the papers seized (R. 169); that no one saw him

taking any bets (R. 169) and no comparison of the defendant's handwriting with the writing on the papers was ever made by the Government. (R. 169) The Government agent also testified that he saw no money in the apartment. (R. 162) The Government agent also admitted that he did not know enough about the particular operation to say whether it was an agency or principal setup, that is, the intermediate step in a betting operation or the final step. (R. 165; 166, 169).

John J. Partington, the Deputy United States Marshall, who participated in the raid, testified as to the raid and admitted that he answered three phone calls (R. 73) and on each there was no bet placed, but merely foul language and someone claiming to be defendant's attorney. (R. 76)

Arthur J. Newton, a Rhode Island State Police detective Commander who participated in the raid on May 8, 1962, testified that the markings on the Armstrong Daily News Review for May 8, 1962, indicated bets placed on horses listed at the various parks (R. 93) but admitted he had never seen similar markings in the past. (R. 102) He did not testify as to the receipt of any telephone bets while in the apartment.

John B. Neill, Jr., a member of the Rhode Island State Police who participated in the raid testified that he answered some 25 or 30 telephone calls (R. 113, 118) and that not one caller asked for Tony, the defendant's name being Anthony (R. 113-114). Trooper Neill also admitted that the defendant never admitted that he had accepted wagers (R. 118). This was the Government's case.

There was no evidence whatsoever introduced by the Government to show or prove that the defendant had taken or accepted any wagers. More important, conceding the writings on the Armstrong News Reviews to be bets, there is no evidence connecting the defendant to the markings or writings, and no evidence to show, assuming, without con-

ceding, the writings to be that of the defendant, whether he was accepting wagers as a writer or a banker, or agent or principal. In the absence of such proof, the Court should have granted defendant's Motion for acquittal, because it is fundamental that neither crime is proved when all that is proved is that one or the other was committed. In this case, the defendant was charged as both agent and principal. There was actually no proof of either. All that was shown was that some sort of bookmaking operation was conducted in the apartment in which the defendant was found. Counsel refers to this Court the case of *United States* v. *Nicholas*, 224 Fed. Supp. 310 (WD Pa. 1963) wherein the instant contention was raised in what appears to be a case of first impression. The facts are somewhat similar, but the Court's opinion is squarely in point and holds that where the Government fails to prove in what capacity the defendant acted, as writer or banker, which is agent or principal, a motion for acquittal must be granted.

In *Nicholas*, supra, the Court said,

> "The situation is the same as if a defendant were charged with adultery and fornication, and the proof merely showed sexual intercourse without indicating whether the parties were married."
>
> "It would seem that under general principals of criminal jurisprudence the proof is too indefinite. Neither crime is proved when all that is proved is that one or the other was committed" *U.S.* v. *Nicholas*, supra, 311.

For the same reasons above stated, and in the same authority, it is respectfully submitted that the jury's verdict on Criminal Information 6826 finding the defendant guilty as a principal is not supported by any evidence in the record, and could only constitute a choice of verdicts

between Counts, without proper foundation. The verdicts are contrary to the evidence, and accordingly contrary to the law.

Conclusion

1. Each of the questions presented herein poses important questions of Federal Criminal Law that should be decided by this Court.

2. The decision below on question 1 concerning the seizure of the property described in the search warrant is in conflict with the conclusions in *Gouled* v. *United States*, 255 U.S. 298 (1921); *Harris* v. *United States*, 331, U.S. 145, 154 (1947).

3. The decision below on question 1 concerning the existence of probable cause for the issuance of the search warrant is in conflict with the conclusions in *Jones* v. *United States*, 362 U.S. 257 (1960); *Sgro* v. *United States*, 287 U.S. 206, 210, 211 (1932).

4. The decision below on question 2 concerning Defendant Petitioner's right to obtain the identity of a confidential informant is in conflict with the conclusions in *Rugendorf* v. *United States*, 376 U.S. 528 (1964); *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957).

5. The decision below on question 3 concerning the supplemental instructions to the jury is in conflict with the conclusions in *Burton* v. *United States*, 196 U.S. 283 (1905); *Brasfield* v. *United States*, 272 U.S. 448 (1926).

6. The decision below on question 4 concerning the Trial Justice's insistence that the jury agree upon a verdict is in conflict with the conclusions in *Burton* v. *United States*, 196 U.S. 283 (1905); *Brasfield* v. *United States*, 272 U.S. 448 (1926).

7. The decision below on question 5 concerning the Trial Justice's denial of Motions for Acquittal present a

question of first impression in this Court, but one which has been considered favorable to the Defendant-Petitioner in *United States* v. *Nicholas*, 224 Fed. Supp. 310 (W.D. Pa. 1963), which poses an important question of Federal Criminal law that should be decided by this Court.

The writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6317.

ANTHONY MARDEROSIAN,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

John P. Bourcier, with whom *Leo Patrick McGowan* was on brief, for appellant.

Frederick W. Faerber, Jr., Assistant U. S. Attorney, with whom *Raymond J. Pettine*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

November 2, 1964.

ALDRICH, *Circuit Judge*. The defendant was convicted of violating 26 U.S.C. §§7203 and 7262 by failure to pay the special occupational tax before engaging in the business of accepting wagers. His first complaint on this appeal is directed to the adequacy of the affidavit on which a search warrant had been issued. This affidavit, which was quite detailed, in substance recited that affiant had reason to believe that a certain apartment (fully described) contained bookmaking records and wagering material, including bet slips, run-down sheets, adding machine, pencils, etc., used

in violation of 26 U.S.C. §§4411, 4412 and 7203; that this belief was based upon information from a reliable source that affiant had found to be reliable on prior occasions that defendant, "a person frequently reputed to be a bookmaker" was engaged in the business of accepting wagers at the said apartment, where he was assisted by and associated with one Carlone, and that both defendant and Carlone were regularly driven to the apartment by one Barrett; that affiant kept the activities of all three parties under surveillance between March 28 and May 3, 1962; that he saw defendant enter or leave the apartment building on March 29 and 30, April 2, 3 and 9, and May 3, 1962, and Carlone on April 4 and 11; that he saw Barrett act as chauffeur for one or the other on twelve occasions; that Barrett appeared to have no other employment, and that defendant and Carlone appeared to have no gainful employment whatever; that defendant's home, where he lived with his family, was eleven miles from the apartment; that Barrett did not drive him there; that defendant had been convicted of violating the state gaming laws on several occasions; that the telephone and electricity at the apartment were in the name of Anthony Maccarone, but that affiant had been unable to discover the existence of such a person; that affiant had searched the appropriate treasury records and that no tax stamps had been issued to defendant, Carlone, Barrett or Maccarone. The affidavit gave further details, but we have already set out more than enough to warrant a finding of probable cause for the issuance of a warrant on May 8, 1962. Probable cause means more than mere suspicion, but in no sense requires proof beyond a reasonable doubt.

Defendant next contends that the property described in the search warrant was not property "designed or intended for use or which is or has been used as the means of committing a criminal offense," F.R.Crim.P. 41(b)(2), but was only "evidence." It is true that mere evidence may not

be seized. *Gouled* v. *United States*, 1921, 255 U.S. 298. Defendant's argument is that while the property might be gambling "instrumentalities," which could be seized if the offense were gambling, the crime, if any, was only the failure to pay the tax. Defendant asserts, "The possession, in and of itself, of [the property] does not, by any stretch of reasonable imagination, constitute a crime." The statutes whose violation the charging sections make a crime require the tax to be paid before the business of accepting wagers is engaged in. See Federal Tax Regulations §601.404(d) and (f). In other words, the crime was completed not when the tax was not paid, but when, the tax not having been paid, the business was carried on. *Cf. United States* v. *Sims*, D.C.W.D.Pa., 1963, 219 F.Supp. 164, 171; *United States* v. *Bowman*, D.C.D.C., 1956, 137 F.Supp. 385, 387. Thus property used in connection with such gambling, although of an innocent nature, is contraband. *United States* v. *$5,608.39 in United States Coin & Currency*, 7 Cir., 1964, 326 F.2d 359; *United States* v. *$1,058.00 in United States Currency*, 3 Cir., 1963, 323 F.2d 211. There is no merit in defendant's contention.

Next defendant asserts error because the court refused to order the government to disclose the name of the informer whose report instigated the surveillance. This is not a case like *Roviaro* v. *United States*, 1957, 353 U.S. 53, where the informer was said to have been a participant in the acts constituting the offense. It is not even a case where the informer's statements constituted part of the basis for the finding of probable cause. All matters allegedly disclosed by the informer were thereafter verified and vouched for directly by the affiant. Defendant's basis for seeking the informer's name is not even as valid as the one found insufficient in *Rugendorf* v. *United States*, 1964, 376 U.S. 528, 533.

We have examined defendant's other contentions and do not find them to call for discussion. His point about the supplementary charge to the jury might have been well taken if the court had in fact stated what defendant asserts. We do not, however, find the charge capable of that interpretation.

Judgment will be entered affirming the judgment of the District Court.

Appendix B

26 United States Code, Section 7203 — Criminal Penalties

Any person required under this Title to pay any estimated tax or tax, or required by this Title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 United States Code, Section 7262 — Criminal Penalties

Any person who does any act which makes him liable for special tax under Sub-chapter B of Chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000.00 and not more than $5,000.00.